Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000517-001 DT 12/18/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

v.

TRAVIS LANCE DARRAH (001)

WEBSTER CRAIG JONES

JOHN P TATZ

MESA MUNICIPAL COURT - COURT ADMINISTRATOR
MESA MUNICIPAL COURT - PRESIDING JUDGE
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. 2011–103211.

Defendant-Appellant Travis Lance Darrah (Defendant) was convicted in Mesa Municipal Court of DUI (drug or its metabolite in person's body). Defendant contends the trial court erred, and that A.R.S. § 28–1381(A)(3) is unconstitutionally vague. For the reasons stated below, this Court affirms the judgment and sentence imposed.

I. Factual Background

On December 8, 2011, Defendant was charged with violating A.R.S. § 28–1381(A)(1) (DUI—impaired to the slightest degree), and 28–1381(A)(3) (DUI—drug or its metabolite in person's body). After hearing arguments at the September 4, 2012, jury trial management conference, the trial court ruled that it would preclude Defendant from presenting evidence of a medical marijuana certificate as a defense to the A.R.S. § 28–1381(A)(3) charge; the trial court ruled that a medical marijuana certificate is not a prescription.[1] On September 8, 2012, Defendant filed a Motion To Dismiss Count 2 as Unconstitutionally Vague, wherein he argued that a reasonable person would believe the medical marijuana recommendation by a doctor is a prescription pursuant to A.R.S. § 28–1381(D),[2] and, to hold otherwise, would confuse reasonable

[1] Transcript of the September 4, 2012, jury trial management conference, p 5, l. 11 to p. 9, l. 25.
[2] A.R.S. § 28–1381(D) provides as follows:

A person using a drug as prescribed by a medical practitioner licensed pursuant to title 32,

people and render A.R.S. § 28–1381(A)(3) unconstitutionally vague. On October 24, 2012, Defendant filed a motion titled Notice That A.R.S. § 36–2802 (D)[3] Grants Defendant a Defense to the Charge of Violating A.R.S. § 28–1381(A)(3). After hearing arguments at the October 30, 2012, jury trial management conference, the trial court denied Defendant's motions, finding A.R.S. § 28–1381(A)(3) is not unconstitutionally vague, and that, because A.R.S. § 36–2802 deals with impairment, it is not a defense to A.R.S. § 28–1381(A)(3).[4]

On the morning of the scheduled November 7, 2012, jury trial, the State moved *in limine* to preclude "any mention or testimony" regarding the issue of medical marijuana, asserting the issue was irrelevant to both charges. After hearing arguments on the matter, the trial court granted the State's Motion *in limine*, finding the use of medical marijuana is irrelevant to the charges.[5] The jury trial resumed on November 21, 2012. Based on the evidence presented, the jurors found Defendant guilty of the A.R.S. § 28–1381(A)(3) charge, and not guilty of violating 28–1381(A)(1). On December 1, 2012, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. Issues:

A. Whether A.R.S. § 28–1381(A)(3) is Unconstitutionally Vague.

The constitutionality of a statute is a matter of law that a court reviews *de novo*. *State v. Bomar*, 199 Ariz. 472, 19 P.3d 613, ¶ 5 (Ct. App. 2001). In reviewing a challenge to a statute, a court presumes that the statute is constitutional and must construe it, if possible, to give it a constitutional meaning. *State v. Bonnewell*, 196 Ariz. 592, 2 P.3d 682, ¶ 5 (Ct. App.1999). The party challenging the validity of a statute has the heavy burden of overcoming that presumption. *Martin v. Reinstein*, 195 Ariz. 293, 987 P.2d 779, ¶ 16 (Ct. App.1999). A statute is unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit standards for those who will apply it. *State v. Takacs*, 169 Ariz. 392, 394, 819 P.2d 978, 980 (Ct. App.1991). The evil of such a statute is the lack of fair warning and of a standard for the adjudication of guilt. *State v. Buhman*, 181 Ariz. 52, 54, 887 P.2d 582, 584 (Ct. App. 1994).

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chapter 7, 11, 13 or 171 is not guilty of violating subsection A, paragraph 3 of this section.

[3] A.R.S. § 36–2802 (D)—titled Arizona Medical Marijuana Act; Limitations—provides as follows:

> This chapter does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal or other penalties for engaging in, the following conduct:
>
> > Operating, navigating or being in actual physical control of any motor vehicle, aircraft or motorboat while under the influence of marijuana, except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.

[4] Transcript of the October 30, 2012, jury trial management conference, p 7, l. 1 to p. 13, l. 16.

[5] Transcript of the November 7, 2012, jury trial, p. 5, l. 19, to p. 15. L. 21.

. . . .

Defendant argues that "a person of ordinary intelligence no longer has fair notice that, while legally using marijuana, he could be violating A.R.S. § 28–1381(A)(3), and that he does not fall within the 'safe harbor' of A.R.S. § 28–1381(D)." A.R.S. § 28–1381(A)(3) makes it unlawful for a person to drive or be in actual physical control of a vehicle in this state while there is any drug defined in A.R.S. § 13–3401 or its metabolite in the person's body. Cannabis (also known as "marijuana") is a drug listed in A.R.S. § 13–3401. There is nothing vague about what is prohibited in A.R.S. § 28–1381(A)(3); a driver either has a drug defined in A.R.S. § 13–3401 or its metabolite in his body, or he doesn't. A.R.S. § 28–1381(D) states that a person using a drug as *prescribed* by a licensed medical practitioner is not guilty of violating A.R.S. § 28–1381(A)(3). The Arizona Medical Marijuana Act ("AMMA") was added by 2010 Prop. 203 (an initiative measure), approved by the voters at the November 2, 2010, general election, and became effective on December 14, 2010. Codified, the AMMA consists of §§ 36–2801 to 36–2819. The AMMA does not give authority for marijuana to be prescribed, and it can not be prescribed under federal law because it is a Schedule I drug pursuant to the Controlled Substances Act. Opinions of the Attorney General are advisory and are not binding. However, reasoned opinions of the state Attorney General should be accorded respectful consideration. *Ruiz v. Hull*, 191 Ariz. 441, 957 P.2d 984, ¶ 28 (1998). Notably, in *Ariz. Op. Att'y Gen. No. I11-004* (July 7, 2011), it states, in pertinent part:

> In particular, medical marijuana sales proceeds do not constitute tax-exempt proceeds of income derived from the sale of prescription drugs under A.R.S. § 42–5061(8), because the Act does not contemplate prescriptions for medical marijuana. Instead, an individual applying for a registry identification card from the Arizona Department of Health Services must submit "written certification" from a physician specifying the patient's debilitating medical condition and stating that in the physician's professional opinion, the patient is likely to benefit from the medical use of marijuana. A.R.S. § 36–2801(18). Medical marijuana is not "prescribed" by a physician under these circumstances because the physician is not directing the patient to use marijuana. Moreover, in contrast to the fact pattern under which a physician writes a prescription that is delivered to a pharmacy, medical marijuana certification is submitted to the Arizona Department of Health Services, rather than to an organization that dispenses medical marijuana.
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> The fact that licensed physicians are prohibited under federal law from prescribing "Schedule I" controlled substances (as defined in § 812 of the Controlled Substances Act), including marijuana, further supports the conclusion that medical marijuana certification submitted to the Arizona Department of Health Services does not amount to a "prescription" for purposes of the prescripttion drug exemption established under A.R.S. § 42–5061(8).

This Court concurs. Marijuana may not be prescribed in Arizona. Accordingly, A.R.S. §

28–1381(D) does not apply to situations involving marijuana, and certainly does not provide a "safe harbor" for those who ingest marijuana and then drive or be in actual physical control of a vehicle in this state. There is nothing vague about this.

Lastly, as the State correctly notes, A.R.S. § 36–2802 (D)[6] does not apply to A.R.S. § 28–1381(A)(3), but, rather, only applied to the 28–1381(A)(1) charge in this case. That A.R.S. § 36–2802 (D) would apply to an 28–1381(A)(3) strains logic and ignores the plain meaning of the statutes.

B. Whether Defendant Should Have Been Allowed To Present Evidence of His Medical Marijuana Card as a Defense to A.R.S. § 28–1381(A)(3) under A.R.S. § 28–1381(D).

As stated above, A.R.S. § 28–1381(D) does not apply to situations involving marijuana because marijuana may not be "prescribed" in Arizona. Consequently, the holder of a valid medical marijuana card may not drive or be in actual physical control of a vehicle in this state while there is marijuana or its metabolite in that person's body. Having a valid medical marijuana card is not a defense to a A.R.S. § 28–1381(A)(3). The trial court did not err when it precluded Defendant from presenting evidence of his medical marijuana card.

C. Whether the Trial Court Abused Its Discretion in Finding that the State Provided Sufficient Foundation that a Qualified Person Drew the Blood.

This Court finds that the trial court did not abuse its discretion in this matter. The State has presented a well-written, well-supported Appellee's Memorandum addressing Defendant's claims, with which this Court concurs. As Defendant has received a copy of the State's memorandum, this Court will not repeat the arguments and authority here.

III. Conclusion

Based on the foregoing, this Court concludes that A.R.S. § 28–1381(A)(3) is not unconstitutionally vague, the trial court did not err when it precluded Defendant from presenting evidence of his medical marijuana card, and the trial court did not abuse its discretion when it found the State provided sufficient foundation that a qualified person drew the blood.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Mesa Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

The Hon. Crane McClennen

[6] *See* footnote 3.

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Judge of the Superior Court 121920130914

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